IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Karthikeyan Sakthivel, Azmathulla Mohammed, Aravind Babu Kadiyala, Biswajit Mohapatra, Venkata Sita Ramaanjeneyul Basati, Rajendra Sharma, Srinivasa Rao Madugula, Mujeeb Mohammed, Ashok Kumar Jayakumar, Divya Bathula, Chetan Joshi, and Sreenisarga Gadde, Sri Lakshmi Alluri, Arpit Khuraswar, Rahul Patil, Mamta Gupta, and Venkata Satya Vishnu Vardhan Parcha,

Plaintiffs,

v.

Kenneth T. Cuccinelli, Acting Director, United States Citizenship and Immigration Services,

Defendant.

C/A No.: 3:18-cv-03194-CMC

Order on
Motion to Dismiss
(ECF No. 26)

Plaintiffs are all beneficiaries of the category of nonimmigrant visas defined in 8 U.S.C. § 1101(a)(15)(H)(i)(b) ("H-1B Visas") of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*. ("INA"). These visas authorize Plaintiffs to live and work in the United States on a temporary basis. Through this action, Plaintiffs challenge revocation of the Form I-129 Petitions for Nonimmigrant Worker status through which they first became H-1B Visa beneficiaries ("Initial H-1B Petitions"). *See* ECF No. 22 (Second Amended Complaint). Plaintiffs' Initial H-1B Petitions were revoked by the United States Citizenship and Immigration Services ("USCIS")[1]

[1] Authority to prescribe conditions for admission of nonimmigrants is vested, by statute, in the Attorney General. 8 U.S.C. § 1184(a)(1), (c)(1). It is undisputed the Attorney General's authority in areas relevant to the present dispute has been delegated to the Department of Homeland Security ("DHS") and certain responsibilities further delegated to USCIS. *See* ECF No. 26 at 20

based on alleged fraud by the entities that filed the petitions and acted as Plaintiffs' initial employers in the United States (collectively "Initial Petitioner" or "EcomNets").[2]

The matter is before the court on motion of Defendant ("Government"), to dismiss for lack of standing and failure to state a claim. ECF No. 26. For reasons set forth below, the motion is denied, though denial rests, in part, on a determination certain issues are not appropriate for resolution by the court at this time.

BACKGROUND

Factual Allegations. The seventeen Plaintiffs allege they are all citizens of India who reside in the United States. ECF No. 22 ¶¶ 1-17 (Second Amended Complaint). Plaintiffs further allege they "are the victims of immigration fraud by EcomNets," which "applied for [and obtained] nonimmigrant visas for each Plaintiff under 8 U.S.C. § 1101(a)(15)(H)." *Id.* ¶ 28. According to Plaintiffs, EcomNets made misrepresentations in the process of petitioning for the H-1B Visas that ultimately issued for the benefit of Plaintiffs. *Id.* ¶ 33.[3]

(addressing delegation of authority). For ease of reference, the court does not distinguish between USCIS and DHS in the remainder of this order.

[2] The Initial H-1B Petitions were filed and Plaintiffs were initially employed in the United States by "EcomNets and its sister companies." ECF No. 22 ¶ 28. For ease of reference, the court refers to these entities collectively as "EcomNets" in the remainder of this order.

[3] As Plaintiffs explain, the first step in the process requires the petitioning employer to "file a labor condition application [('LCA')] with the U.S. Department of Labor." *Id.* ¶ 31. Plaintiffs allege EcomNets misrepresented the locations where Plaintiffs would work in the LCAs on which their Initial H-1B Petitions rely but placed Plaintiffs "at locations that would demand much higher wages." *Id.* ¶ 33. "By charging third parties wages commensurate with the [placement] locality, but paying the Plaintiffs wages commensurate with rural Virginia, EcomNets was able to profit significantly." *Id.* ¶ 35; *but see* ECF No. 22 ¶ 550 (alleging USCIS cannot show fraud in Plaintiffs' Initial H-1B Petitions).

"The owners of EcomNets were indicted for their scheme" and EcomNets was "shut down with the government's knowledge in 2016." ECF No. 22 ¶ 36; *see also id.* ¶¶ 37-40 (referring to "EcomNets[']s guilty plea"). Plaintiffs deny the resulting guilty pleas identified any Plaintiff as a co-conspirator or suggested any Plaintiff participated in the fraud. *Id.* ¶¶ 37-41.

After EcomNets was shut down, USCIS began the process of revoking Plaintiffs' Initial H-1B Petitions. *E.g.*, *id.* ¶¶ 76, 77, 105, 140. USCIS records indicate it mailed notices of intent to revoke ("NOIRs") to EcomNets for most Plaintiffs. *Id.* At the time these NOIRs were mailed, USCIS was aware EcomNets had been shut down and the addresses to which the NOIRs were mailed were no longer valid. *E.g.*, *id.* ¶ 36. USCIS was also on notice that each Plaintiff had lawfully moved on to a new employer. *E.g.*, *id*. ¶ 44 (alleging all "Plaintiffs moved on in lawful ways to different, legitimate employers").[4] USCIS received such notice through porting petitions ("H-1B Portability Petitions") filed by Plaintiffs' new employers. *See* ECF No. 22 ¶¶ 53-60 (addressing amendments to INA that allow H-1B Visa beneficiaries to move between employers upon filing of an H-1B Portability Petition); *see also* ECF No. 26 at 5 (Government opposition memorandum acknowledging 8 U.S.C. § 1184(n)(1) allows H-1B beneficiaries "to accept new employment upon the filing by the prospective employer of a new petition on behalf of such aliens"

[4] While the specific allegations vary between Plaintiffs, all allege they had lawfully moved on to new employers before USCIS mailed NOIRs to EcomNets. *See*, *e.g.*, *id.* ¶ 71-74 (alleging new employer filed an H-1B Portability Petition that was granted and obtained an extension on behalf of Plaintiff Karthikeyan Sakthivel in 2015, and a second new employer filed an H-1B Portability Petition in 2017, which petition remains pending); *id.* ¶¶ 99-100 (alleging new employers filed H-1B Portability Petitions on behalf of Plaintiff Azmathulla Mohammed in May 2016 and August 2017, both of which remain pending).

and resulting "[e]mployment authorization shall continue . . . until the new petition is adjudicated and shall cease if [it] is denied.").

Many if not all NOIRs mailed to EcomNets were returned to USCIS as undeliverable. *E.g., id.* ¶¶ 104, 139. Thereafter, USCIS revoked Plaintiffs' Initial H-1B Petitions. *E.g.*, *id.* ¶¶ 105, 140. Though not expressly alleged, the revocations were presumably based directly or indirectly on a finding of fraud that depended, at least in part, on the absence of any opposition.[5] Neither Plaintiffs nor their then-current employers had an opportunity to oppose revocation on either factual or legal grounds. ECF No. 22 ¶¶ 549, 562, 563.

As with the NOIRs, USCIS sent revocation notices for each Plaintiff's Initial H-1B Petition only to EcomNets. *E.g.*, *id.* ¶¶ 75, 106, 141. Many if not all of these notices were returned as undeliverable. *E.g.*, *id.* ¶¶ 78, 107. Plaintiffs learned of the revocations through other means including denial of other petitions or by checking on-line resources. *E.g.*, *id.* ¶¶ 79, 82, 103, 108, 142, 445.

Plaintiffs anticipate USCIS will rely on the revocation of their Initial H-1B Petitions to revoke or deny subsequent H-1B Portability Petitions, immigrant visa petitions ("I-140 Petitions") filed on behalf of most if not all Plaintiffs, and related extensions available to H-1B beneficiaries who have approved I-140 Petitions.[6] *See id.* ¶ 535 ("Upon information and belief, [USCIS] now

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[5] Through its motion to dismiss, the Government asserts USCIS (1) revoked the Initial H-1B Petitions for fraud based on findings each petition included material misrepresentations, and (2) relied on a statement of facts attached to the guilty plea of one of EcomNets' owners to support those findings. ECF No. 26 at 7, 8 (citing but not attaching statement of facts).

[6] Most if not all Plaintiffs have approved I-140 Petitions filed on their behalf by either EcomNets or a subsequent employer and, where initially filed by EcomNets, transferred to a subsequent employer. *See id.* ¶¶ 73, 96, 131, 160, 189, 228, 255, 282, 318, 390, 412, 433, 451, 478 (Plaintiff-

intends to deny Plaintiffs' pending [H-1B Portability] [P]etitions and extension petitions filed by new employers because it revoked Plaintiffs' initial [H-1B] Visas."). This is because "[w]ithout [their Initial H-1B Petitions], Plaintiffs do not get the benefits of the portability provisions of law." *Id.*

Causes of Action. Based on these common factual allegations, and Plaintiff-specific allegations of harm that likely will result from revocation of their Initial H-1B Petitions, Plaintiffs assert two causes of action: (1) a claim under the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A); and (2) a claim for violation of Plaintiffs' rights to procedural due process. ECF No. 22 ¶¶ 541-70. Both causes of action focus on USCIS's failure to provide Plaintiffs or their current employers with notice and an opportunity to be heard before revocation of Plaintiffs' Initial H-1B Petitions, though the APA claim also rests on additional grounds.[7]

Motion to Dismiss. The Government moves to dismiss on two grounds. ECF No. 26. First, it argues Plaintiffs lack standing to pursue either of their claims. This argument rests on the premise only the Initial Petitioner, EcomNets, has standing to challenge revocation of the Initial H-1B Petitions.

Second, the Government argues Plaintiffs have failed to state a claim. This argument rests, in part, on the premise USCIS followed proper procedures in sending NOIRs only to EcomNets

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specific allegations claiming approved I-140 Petitions for 14 of the 17 Plaintiffs); ECF No. 27 at 2, 4, 9, 11 (asserting in opposition memorandum that *all* Plaintiffs have approved I-140 Petitions); ECF No. 28 at 4 (stating, in reply, "Defendant does not dispute [Plaintiffs'] contention" each of them is a beneficiary of an approved, employment-based immigrant visa petition, but arguing this fact is "not relevant to whether Plaintiffs have standing to challenge the nonimmigrant visa petitions at issue here.").

[7] Additional detail as to the APA claim is included in the discussion of the Government's motion to dismiss for failure to state a claim. *Infra* Discussion § II.C.1.

and, subsequently, revoking the Initial H-1B Petitions after receiving no opposition from that entity. In addition, the Government argues (1) multiple paragraphs within the first cause of action fail to state a claim because they do no more than recite elements of an APA claim without factual detail; and (2) the second cause of action fails in its entirety because Plaintiffs do not have a protected property or liberty interest in their Initial H-1B Petitions.

DISCUSSION

I. STANDING

A. Article III Standing

Standard. To have standing under Article III of the Constitution, a party must demonstrate: (1) an injury-in-fact; (2) fairly traceable to the challenged conduct of the defendant; and (3) that likely can be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Discussion. The Government recites these three requirements, but does not argue Plaintiffs fail to satisfy them. *See* ECF No. 26 at 12-16 (arguing only that Plaintiffs fail to satisfy the additional zone-of-interests requirement). Having conducted its own analysis, the court finds the constitutional prerequisites satisfied.

While not so limited, the focus of Plaintiffs' claims is on USCIS's failure to provide them or their then-current employers notice of or an opportunity to respond to the planned revocation of Plaintiffs' Initial H-1B Petitions. Plaintiffs maintain this failure resulted in denial of notice to any real party in interest and, ultimately, revocation based at least in part on the absence of any opposition. Thus, the harm at issue is, at minimum, the *lost opportunity* for notice and opportunity to respond. Plaintiffs further allege revocation of their Initial H-1B Petitions will likely be relied on to deny or revoke H-1B Portability Petitions filed by subsequent employers, I-140 Petitions

filed by or transferred to subsequent employers, and related extensions of Plaintiffs' authorization to remain and work in the United States.[8]

In *Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015), the Second Circuit Court of Appeals held all three constitutional requirements were satisfied under similar circumstances: where a visa beneficiary challenged USCIS's revocation of an I-140 Petition based on an absence of notice to the beneficiary or her then-current employer. The court explained that, even if the ultimate outcome was the same (denial of a "green card"), "'lost opportunity is itself a concrete injury-and a favorable decision would redress it.'" *Id.* at 731 (*quoting Patel v. U.S. Citizenship & Immigration Servs.*, 732 F.3d 633, 638 (6th Cir. 2013)); *see also Musunuru v. Lynch*, 831 F.3d 880, 882 n.1 (7th Cir. 2016) (stating beneficiary of I-140 Petition had "Article III standing" in action challenging adequacy of notice sent only to initial petitioner despite beneficiary having ported to a new employer).[9]

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[8] While the Government asserts in reply that "Plaintiffs have not alleged any adverse action, or threatened adverse action, on their approved immigrant visa petitions," it acknowledges revocation of the Initial H-1B Petitions will cause Plaintiffs to lose their "cap exempt" status. ECF No. 28 at 4, 8. Thus, at least for purposes of this motion, the Government does not appear to dispute that USCIS will or at least may rely on revocation of the Initial H-1B Petitions as grounds for revocation or denial of subsequent H-1B Portability Petitions, I-140 Petitions, and related extensions.

[9] *Musunuru*'s only discussion of standing is a conclusory statement in one footnote (n.1) that Plaintiff has Article III standing. The note distinguishes between standing before the agency and standing in court, noting the former does not determine the latter. The decision focuses on (1) a challenge to subject matter jurisdiction and (2) the merits of who is entitled to notice. As to the first issue, *Musunuru* holds the court has jurisdiction to consider a challenge to the procedure followed in rendering a discretionary decision, even if the merits of the decision are not subject to judicial review. *Musunuru*, 831 F.3d at 887-88. On the merits of the notice issue, the court holds notice sent only to the plaintiff-beneficiary's former employer (initial petitioner) was inadequate and notice should have been provided to the plaintiff-beneficiary's then-current employer (but not

As the Government argues in addressing the separate zone-of-interests requirement, there are distinctions between the type petition at issue in *Mantena* (an immigrant petition) and here (a nonimmigrant petition). *See infra* Discussion §§ I.B.1 ("Arguments"), I.B.3 ("Possible Distinction"). The Government does not, however, point to any distinction that impacts the three requirements for Article III standing. In any event, the court finds these requirements satisfied to the extent Plaintiffs are challenging absence of notice and opportunity to respond. As *Mantena* found, whether or not Plaintiffs ultimately succeed in opposing revocation of their Initial H-1B Petitions, this lost opportunity is a concrete injury, fairly traceable to USCIS's denial of notice and opportunity to be heard, and would be redressed if Plaintiffs establish they or their current employers were entitled to notice and an opportunity to be heard before revocation.[10]

B. Zone of Interests

1. Arguments

Government's Argument. The Government's challenge to standing focuses on whether Plaintiffs fall within the zone of interests protected by the statutes on which their claims depend. ECF No. 26 at 12 ("[A] statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked."); *see generally Lexmark Intern. Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) (explaining zone of interests, though

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the plaintiff-beneficiary). *Id.* at 890-91 (relying, in part, on *Mantena* but going further in deciding who was entitled to notice). The then-current employer was not a party to the litigation.

[10] This determination applies only to Plaintiffs' right to challenge the adequacy of notice. For reasons explained below, the court does not, at this time, determine whether Plaintiffs have standing to raise other challenges that go to the merits of the revocation decision. *See infra* Discussion § I.B.4.

sometimes mischaracterized as a "prudential" limitation, turns on congressional intent). The Government argues Plaintiffs' claims do not fall within the zone of interests protected by the relevant provisions of the INA because "[i]n the case of employment-based nonimmigrant visa petitions**.** the [INA], and associated regulations, protect the interests of petitioners (and American workers) rather than [visa] beneficiaries." ECF No. 26 at 12 (citing 8 U.S.C. § 1184(c)(1) and 8 C.F.R. §§ 103.2(a)(3), 103.3(a)(1)(iii)). The Government asserts the relevant petitioner in this case is the employer that submitted the Initial H-1B Petitions, EcomNets. It argues this conclusion is supported by regulations that provide "[i]f the petitioner withdraws the benefit or goes out of business, the petition is immediately revoked, and the beneficiary has no recourse." *Id.* at 13 (citing 8 C.F.R. § 214.2(h)(11)(ii)).[11]

The Government acknowledges the Fourth Circuit's statement in *Taneja v. Smith*, 795 F.2d 355 (4th Cir. 1986), that it "believes" the beneficiary of an employment-based visa petition has standing to challenge revocation of that petition. ECF No. 26 at 13 (citing *Taneja*, 795 F.2d at

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[11] The referenced section, 8 C.F.R. § 214(h)(11) is titled "Revocation of approval of petition." Subpart (ii) provides for automatic revocation "if the petitioner goes out of business or files a written withdrawal of the petition." 8 C.F.R. § 214(h)(11)(ii). Subpart (iii) addresses "Revocation on notice" and lists five grounds including if "[t]he beneficiary is no longer employed by the petitioner in the capacity specified in the petition." 8 C.F.R. § 214(h)(11)(iii). The Government does not address how these provisions should be read in light of the portability amendments to the INA (discussed below), which allow an H-1B Visa beneficiary to "port" to a new employer, thus arguably requiring "petitioner" in these subparts be read to refer to the beneficiary's then-current employer (after lawful porting).

358 n.7.). It argues the circumstances in *Taneja* are distinguishable because the visa at issue there was an immigrant (as opposed to a nonimmigrant) visa.[12]

Based on the same distinction, the Government argues most of the decisions Plaintiffs cite in the Second Amended Complaint fail to support standing in this case. *Id.* at 13-15 (noting all cited circuit court decisions that found standing addressed immigrant visas). It notes only two of Plaintiffs' cited district court decisions address nonimmigrant visas. *Id.* at 15 (discussing *Next Generation Tech., Inc. v. Johnson*, 328 F. Supp. 3d 252 (S.D.N.Y. 2017); *Tenrec, Inc. v. U.S. Citiz & Immigr. Serv's.*, 3:16-cv-995-SI, 2016 WL 5346095 (D. Or. Sept. 22, 2016)). Of these, only one (*Tenrec*) actually finds the nonimmigrant visa beneficiary has standing and that decision "dismissed the distinction between immigrant and nonimmigrant classifications without analysis." *Id.* at 15. The other decision addressing a nonimmigrant visa (*Next Generation*) found it unnecessary to address whether the beneficiary had standing because his employer (the petitioner) was also a plaintiff. *Id.*

In addition to addressing the decisions Plaintiffs cite in the Second Amended Complaint, the Government points to three district court decisions that "considered beneficiary standing in the employment-based nonimmigrant context" and found those beneficiaries to be "outside the zone of interests and therefore without standing to sue. *Id.* at 15 (discussing *Hispanic Affairs Project v. Perez*, 206 F. Supp. 3d 348, 367, *modified, in part, on reconsideration*, 319 F.R.D. 3 (D.D.C. 2016); *Blancher v. Ridge*, 436 F. Supp. 2d 602 (S.D.N.Y. 2006); *Cost Saver Management, LLC*,

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[12] Though *Taneja* does not address or rely on this distinction, the Government appears to be correct as to the nature of the visa at issue. *See Taneja*, 795 F.2d at 356 (referring to "sixth preference visa" under 8 U.S.C. § 1153 (addressing "Allocation of Immigrant Visas")).

v. Napolitano, CV-10-2015-JST, 2011 WL 13119439 at *3 (C.D. Cal. June 7, 2011)). Of these decisions, only one addressed standing of an H-1B Visa beneficiary and none addressed the impact of amendments allowing such beneficiaries to port to new employers or any similar scenario for the other categories of visas addressed.[13]

Plaintiffs' Response. Plaintiffs argue amendments to the INA, adopted between 1998 and 2002, evidence sufficient intent to benefit H-1B visa beneficiaries to bring them within the zone-of-interests necessary for standing. ECF No. 27 at 5-7. These amendments include (1) the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), Public Law 105-277, div. C., tit. IV, 112 Stat. 2681 (1998); and (2) the American Competitiveness in the Twenty-First Century Act of 2000, Public Law 1-6-131, 114 Stat. 1251, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273,116 Stat. 1758 (2002) ("AC21") (collectively "INA Amendments"). Plaintiffs also rely on a USCIS rule,

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[13] Only *Blancher* addresses standing of an H-1B beneficiary. The court held the petitioner (employer) had standing to raise a Due Process claim but the beneficiary did not because an "alien lacks any constitutionally protected right to enter the United States as a nonimmigrant." 436 F. Supp. 2d at 606 n.3. Thus, the court rested its analysis on the availability of a constitutional (rather than an APA) claim. The case also involved denial of an initial petition, rather than revocation, so necessarily did not involve a post-porting scenario.

Hispanic Affairs Project addresses standing of individuals who sought general H-2A agricultural visas. It held domestic sheepherders had standing to challenge application of rules establishing procedures for hiring temporary agricultural workers under that category of visa while foreign workers did not. The court rested its decision on an understanding the INA was designed "to protect American workers from the deleterious effects the employment of foreign labor might have on domestic workers and working conditions." 206 F. Supp. 3d at 367.

Cost Saver Management addresses a foreign worker's standing to challenge denial of a nonimmigrant "L1-A" visa, which allows multinational companies to effect intracompany transfers of managerial employees. The court held the worker lacked standing because "any legally protected interest that derives from the L1-A petition belongs [to the employer] as it filed the petitions and [the intended employee] had not been approved for the visa." 2011 WL 13119439 at *3.

which took effect January 17, 2017, implementing the INA Amendments. *See* Final Rule, Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82398 (adopted Nov. 16, 2016, effective January 17, 2017) ("USCIS Final Rule"). *Id.*

Plaintiffs rely, in particular, on "portability" provisions of the INA Amendments, which allow H-1B Visa beneficiaries to (1) change employers upon the new employer's filing of an H-1B Portability Petition (8 U.S.C. § 1184(n)), (2) port their I-140 Petitions to new employers under specified circumstances, and (3), upon approval of an I-140 Petition, extend their stay in the United States and continue working while waiting on an immigrant visa to become available (8 U.S.C. § 1154(j)). *Id.* (discussing USCIS Final Rule, 81 Fed. Reg. at 82399-401). The USCIS Final Rule characterizes the rule changes implementing the INA Amendments as follows:

> *H-1B extensions of stay under AC21.* The final rule addresses the ability of H-1B nonimmigrant workers who are sponsored for [legal permanent resident ("LPR")] status (and their dependents in H-4 nonimmigrant status) to extend their nonimmigrant stay beyond the otherwise applicable 6-year limit pursuant to AC21.
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> *INA 204(j) portability.* The final rule addresses the ability of certain workers who have pending applications for adjustment of status to change employers or jobs without endangering the approved Form I-140 petitions filed on their behalf.
>
> *H-1B portability.* The final rule addresses the ability of H-1B nonimmigrant workers to change jobs or employers, including: (1) Beginning new employment with new H-1B employers upon the filing of non-frivolous petitions for new H-1B employment ("H-1B portability petition"); and (2) allowing H-1B employers to file successive H-1B portability petitions (often referred to as "bridge petitions") and clarifying how these petitions affect lawful status and work authorizations.

Id. at 5 (quoting 81 Fed. Reg. at 82400).

Distinguishing themselves from H-1B Visa beneficiaries who are still working for the petitioner whose Initial H-1B Petition is challenged, Plaintiffs assert each of them has not only moved on to a new employer as allowed by the INA Amendments but is the beneficiary of an

approved I-140 Petition. ECF No. 27 at 2, 4, 9, 11. Plaintiffs argue the differences between beneficiaries of immigrant and nonimmigrant visas are not sufficient to warrant denial of standing to H-1B Visa beneficiaries where, as here, the beneficiaries are seeking to preserve statutory benefits that allowed them to port to new employers and enhanced their ability to pursue immigrant status after such porting.

Government's Reply. The Government addresses the impact of the INA Amendments on standing for the first time on reply. ECF No. 28 at 5, 6.[14] It notes Plaintiffs' reliance on "the increased job portability [afforded] by these statutory provisions" but argues the "distinctions in these very job portability provisions highlight the key 'zone of interests' distinction between immigrant and nonimmigrant visa petitions." *Id.* at 5. Specifically, while the beneficiary of an "*immigrant* visa petition can change jobs himself/herself," if requirements are satisfied, "the beneficiary of a *nonimmigrant* H-1B visa petition is only authorized to accept new employment 'upon the filing by the prospective employer of a new petition on behalf of such immigrant[.]'" *Id.* (quoting 8 U.S.C. § 1184(n)(1)) (emphasis added). The Government concludes the H-1B Visa beneficiary's lack of autonomy in changing employers demonstrates why "only the petitioning

[14] The only reference to these amendments in the Government's opening memorandum is within a quotation included in the Government's argument in support of dismissal for failure to state a claim. *See* ECF No. 26 at 18-19 (quoting USCIS, *Matter of V-S-G-Inc*., Adopted Decision 2017-06 at 3 n.7 (AAO Nov. 11, 2017), PM-602-0149 (available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-11-11-PM-602-0149-Matter-of-V-S-G-Inc.-Adopted-Decision.pdf (last visited December 14, 2018) (hereafter "*Matter of V-S-G-Inc.*")).

employer falls within the 'zone of interests' of the statutes governing the H-1B petitioning process." *Id.*[15]

2. Standard

In addition to satisfying the constitutional (Article III) requirements, to have standing a plaintiff must "fall within the class of plaintiffs whom Congress authorized to sue." *Lexmark*, 572 U.S. at 128. Whether a plaintiff falls within the relevant zone of interests turns on "traditional principles of statutory interpretation." *Id.* In the context of a claim arising under the APA, "the test is not especially demanding[,]" and "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress authorized that plaintiff to sue." *Lexmark*, 572 U.S. at 130 (noting Court has "often conspicuously included the word 'arguably' in the test to indicate the benefit of any doubt goes to the plaintiff"); *see also Lujan*, 497 U.S. at 883 (providing example of court reporter as someone who would satisfy Article III standing requirements as a result of failure to comply with a statutory requirement hearings be "on the record" but who would not be within the zone of interests sought to be protected by that requirement).

3. Discussion – Zone of Interests for Notice-Related Allegations

For reasons explained below, the court finds Plaintiffs fall within the zone of interests protected by the INA *for purposes of seeking a judicial determination whether the revocations at issue were invalid due to a failure of notice* to Plaintiffs or their then-current employers and

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[15] The Government does not address whether the new employer, who filed the H-1B Portability Petition, should be treated as the "petitioner" entitled to notice in this circumstance. *But see Matter of V-S-G-Inc.* at 12, 13 (indicating USCIS opposes notice to new employers under any circumstances) (discussed *infra* nn. 21, 26).

corresponding denial of opportunity to respond. This ruling applies to the APA claim to the extent it challenges adequacy of notice and opportunity to respond and the Due Process claim in full (as it only challenges procedural defects). Standing to seek judicial review on any other ground is discussed in Section I.B.4 below.

Intent of INA Amendments. The Government's opening arguments rest on the premise the INA is intended *solely* to benefit U.S. employers and domestic workers, at least in the context of H-1B Visas. Whether or not accurate prior to adoption of the INA Amendments, the intent is now broader as USCIS itself explained in the USCIS Final Rule:

> DHS is amending its regulations related to certain employment-based immigrant *and nonimmigrant* visa programs. The final rule is intended to benefit US employers *and foreign workers participating in these programs* by streamlining the processes for employer sponsorship of *nonimmigrant workers for lawful permanent resident (LPR) status, increasing job portability and otherwise providing stability and flexibility for such workers*, and providing additional transparency and consistency in the application of DHS policies and practices related to these programs. These changes are primarily intended to better enable U.S. Employers to employ and retain high-skilled workers who are beneficiaries of employment-based immigrant visa (I-140) petitions, *while increasing the ability of these workers to further their careers by accepting promotions, changing positions with current employers, changing employers and other employment opportunities*.

81 Fed. Reg. at 82399 ("Clarifications and Policy Improvements") (emphasis added); *see also id.* at 82436 (explaining "60-day grace period [given H-1B beneficiaries to find new jobs] further supports AC21's goals of providing improved certainty and stability to *nonimmigrants* who need to change jobs or employers." (emphasis added)). Thus, while the INA still may be intended *primarily* to benefit U.S. employers and domestic workers, relatively recent amendments evidence a broader intent to *also* protect immigrant *and nonimmigrant* workers in specific situations. As explained below, specific situations in which those protections apply are at issue in this action.

Impact of Exercise of Portability Benefits on Standing. When an H-1B Visa beneficiary exercises rights afforded under the INA Amendments to port to a new employer, the beneficiary's interests become at least partially disconnected from those of the Initial Petitioner. Most critically, the beneficiary may have a continued interest in defending the validity of the Initial H-1B Petition (due to the dependence of later H-1B Portability Petitions or I-140 Petitions on the Initial H-1B Petition) while the Initial Petitioner may not have a continued interest regardless of the validity of the challenged petition. Such a disconnect would be especially strong where, as here, the Initial Petitioner has pleaded guilty to misconduct relating to visa petitions and has gone out of business.[16] Porting also creates a new interest, that of the new employer, whose interest in an H-1B Portability Petition may be dependent on continued viability of the Initial H-1B Petition.[17] Like the H-1B

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[16] In some circumstances, such as where an adverse ruling may impair the Initial Petitioner's ability to obtain or defend other petitions, the Initial Petitioner may have a continued interest in defending an H-1B (or I-140) Petition that benefits an employee who has ported to a new employer. However, where the Initial Petitioner has already pleaded guilty to fraud relating to other petitions, gone out of business, or both, it may have no interest in defending an H-1B (or I-140) Petition that benefits a former employee. Likewise, at least where it would not have other adverse consequences, the Initial Petitioner might elect not to defend a petition benefitting a former employee due to time and expense, adverse competitive interests vis-à-vis the new employer, displeasure at the employee's decision to change employers, or other reasons.

[17] As the Government explains, the number of foreign workers who may be issued an H-1B Visa is subject to an annual cap. ECF No. 26 at 4 (noting cap after 2003 is 65,000 per year). A foreign worker is "cap exempt" (not subject to the cap in a given year) if counted against the cap within the six prior years. This benefit is carried forward with lawful porting. However, if the H-1B Petition through which the foreign worker became cap exempt is revoked for fraud or misrepresentation "the cap number is taken away from the beneficiary and restored back to the total number" available, causing the beneficiary to lose his or her cap-exempt status. *Id.* (citing 8 U.S.C. § 1184(g)(3)). When this occurs "one number is restored to the total number of aliens who may be issued visas . . . in the fiscal year in which the petition is revoked, regardless of the fiscal year in which the petition was approved." 8 U.S.C. § 1184(g)(3).

Visa beneficiary, this employer's interest may well diverge from the interests of the Initial Petitioner.[18]

In sum, it is the exercise of the INA Amendments' portability provisions that creates the disconnect between the beneficiary and Initial Petitioner. And it is this disconnect which threatens the continued receipt of the benefits conferred by the portability provisions on the beneficiary and his or her new employer at least where the disconnect results in a failure to provide any real party in interest notice and an opportunity to be heard before revocation of the Initial H-1B Petition.

Mantena. In *Mantena*, the Second Circuit Court of Appeals addressed a very similar disconnect, between the initial petitioner and beneficiary of an approved I-140 Petition.[19] There, as here, the beneficiary had lawfully ported to a new employer after the petition was filed but before USCIS sought to revoke it. The court found this disconnect warranted finding the beneficiary fell within the zone of interests of the underlying statute and, therefore, had standing to challenge the adequacy of notice sent only to the initial petitioner. *Id*. at 730-33.[20]

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[18] The current Plaintiffs do not include any employers. Thus, the interests of new employers are considered only to the extent they might support a finding *Plaintiffs* have standing to ask whether NOIRs relating to revocation of their Initial H-1B Petitions were defective because they were not sent either to Plaintiffs *or their then-current employers*.

[19] Here, the challenged petition is an H-1B Petition granting *nonimmigrant* status. In *Mantena*, the challenged petition was an I-140 Petition seeking *immigrant* status (subject to availability of a visa based on the country of origin). This distinction is discussed below. *Infra* this section ("Possible Distinction").

[20] In *Mantena*, the court was faced with a foreign worker's challenge to revocation of an approved I-140 Petition filed by her former employer where neither the worker nor her then-current employer was given notice of or an opportunity to respond. The circumstances giving rise to revocation were similar to those here: (1) the former employer who filed the challenged initial petition, an I-140 Petition, pleaded guilty to fraud in connection with a petition filed on behalf of a different beneficiary; (2) based on this admission of guilt, USCIS initiated revocation

The Second Circuit first rejected the Government's reliance on regulations that defined who was an "affected party" entitled to notice and an opportunity to respond in administrative proceedings. *Id.* (holding whether party has standing to bring an action in federal court is not dependent on agency's definition of standing for administrative proceedings). Relying on the INA Amendments, the court found Mantena fell "within the zone of interests protected by the statute" because "[t]he text of the INA leaves no doubt that the interests of employment-based visa petition applicants are directly related to the purposes of the INA." *Id.* at 733 (quoting *Shalom Pentecostal Church v. Acting Sec'y U.S. Dep't of Homeland Security*, 783 F.3d 156, 164 (3d Cir. 2015) (internal marks omitted)). "'The so-called portability provisions[,] . . . likewise reflect a congressional intent to protect the interests of qualified aliens.'" *Id.* (quoting *Patel v. U.S. Citizenship & Immigration Servs.*, 732 F.3d 633, 636 (6th Cir. 2013). "It follows that to the extent that federal courts have jurisdiction to hear such arguments, qualified aliens have standing to bring these arguments to our courts." *Id.*; *see also Musunuru*, 831 F.3d at 882 n.1 (discussed *supra* Discussion § I.A).

Possible Distinction. At least at first blush, the same factors at play here (exercise of porting benefits causing disconnect between beneficiary and petitioner) suggest the same zone-of-interests determination as in *Mantena*. However, without directly addressing *Mantena*, the Government argues distinctions between immigrant and nonimmigrant visas warrant a different

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proceedings for *all* petitions filed by the employer, asserting all were fraudulent; (3) USCIS did not notify either the visa beneficiary, who had by then lawfully ported to another employer, or her new employer of the revocation proceeding; and (4) USCIS revoked the petition based on the absence of any response. As here, Mantena's then-current employer was not a co-plaintiff.

determination here.[21] Specifically, the Government argues nonimmigrant visa beneficiaries are distinguishable from immigrant visa beneficiaries because a beneficiary of a nonimmigrant visa petition "has no recourse" if the "petitioner withdraws the benefit or goes out of business," because the petition is immediately revoked in either circumstance, and these beneficiaries "are generally admitted . . . only for the validity of the petition, which can be revoked at any time, and are authorized to work only for the petitioning employer." ECF No. 26 at 13, 14.

It is not entirely clear that these distinctions continue. Most critically, the portability provisions themselves disconnect the beneficiary's employment from the Initial Petitioner, suggesting the Initial Petitioner could not defeat portability by "withdraw[ing] the benefit" after the employee ports to a new employer. Further, as noted in the USCIS Final Rule, H-1B Visa beneficiaries are afforded various protections against loss of their right to remain and work in the United States including having a 60-day grace period "to pursue new employment" if their "employment ceases prior to the end of the petition validity period." *See* 81 Fed. Reg. at 82401 (also noting purpose of amendments includes providing "additional stability and certainty" to both "U.S. employers *and individuals eligible for employment*" (emphasis added)). Even if the

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[21] While not directly addressed in the Government's memoranda, *Mantena* is addressed extensively in *Matter of V-S-G-Inc.*, which the Government quotes in support of dismissal for failure to state a claim. *See* ECF No. 26 at 18, 19; *supra* n.14. *Matter of V-S-G-Inc.* effectively adopts *Mantena*'s rationale in support of USCIS's determination beneficiaries of I-140 Petitions who have lawfully ported to new employers should be given notice and an opportunity to respond in administrative proceedings to revoke I-140 Petitions filed by their former employers. *Matter of V-S-G-Inc.* at 9, 10. However, it declines to extend the right to notice to H-1B beneficiaries or subsequent employers under any circumstances. *Id.* at Cover Memorandum, 3 n.7, 11-13. As acknowledged in *Matter of V-S-G-Inc.*, the decision is intended solely to establish procedures to be followed within the agency, does not purport to address federal court standing, and is not to be relied on to bind the agency in any federal court proceeding. *Id.* at Cover Memorandum.

distinctions on which the Government relies remain valid, they do not implicate the particular factors *Mantena* found significant in its zone-of-interests analysis: exercise of portability rights and resulting disconnect between Initial Petitioner and beneficiary. Thus, the argued distinctions on which the Government relies do not persuade the court nonimmigrant beneficiaries fall outside the zone of interests of the INA where (1) the beneficiary has lawfully ported to a new employer, and (2) is challenging the adequacy of notice sent only to the Initial Petitioner after porting has occurred.

Ultimately, as did the court in *Mantena*, this court finds the underlying portability provisions that created the disconnect between the Initial Petitioner and Plaintiffs "reflect a congressional intent to protect the interests of qualified aliens." *See Mantena* at 733. The claimed injury, lack of notice to an affected party (whether Plaintiffs or their current employers) derives from exercise of the portability benefit because, but for portability, Plaintiffs would still have been working for EcomNets (or would have lost their H-1B rights automatically due to its demise) when the NOIRs were mailed. Moreover, because of the alleged dependence of later H-1B Portability Petitions and I-140 Petitions on the Initial H-1B Petitions, Plaintiffs portability rights afforded under AC21 will likely be impaired by revocation of their Initial H-1B Petitions.[22] The court, therefore, finds Plaintiffs interests are not "so marginally related to or inconsistent with the purposes implicit in the statute" that Plaintiffs should be foreclosed from seeking a judicial ruling

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[22] As explained in *Mantena*, revocation of an earlier-filed, approved I-140 Petition results in loss of the priority date established by that petition but does not preclude reliance on a later-filed I-140 Petition. In contrast, if Plaintiffs' concerns are born out, revocation of their Initial H-1B Petitions may serve as a basis for revocation or denial of Plaintiffs' later H-1B Portability Petitions, I-140 Petitions, and related extensions. Thus, the harm that will result from the lack of notice and opportunity to respond is arguably greater in the context of an H-1B Petition than an I-140 Petition.

on whether notice was adequate. *See Lexmark*, 572 U.S. at 130. The Government's motion to dismiss for lack of standing is, therefore, denied to the extent it challenges Plaintiffs' standing to raise concerns as to the adequacy of notice and opportunity to respond.

4. Discussion – Zone of Interests for Merits-Based Allegations

In addition to challenging the revocations based on absence of notice and opportunity to respond, Plaintiffs allege the revocations are invalid for more substantive reasons including because (1) USCIS *cannot* establish fraud in each of the petitions at issue, (2) revocations were precluded as a matter of law due to the age or status of the visas, and (3) a number of generally stated allegations sufficiently broad to arguably include merits-based challenges (collectively "Merits-Based Allegations"). These allegations go to the merits of the revocation determinations (assuming proper notice) and, consequently, raise different standing issues than the notice-related allegations.

Neither party addresses the distinct standing issues raised by Plaintiffs' Merits-Based Allegations. As noted above, the Government's standing argument focuses on the distinction between immigrant and nonimmigrant visas (rather than distinctions between a notice-based and merits-based challenges). It offers no argument Plaintiffs lack standing to pursue Merits-Based Allegations should the court find they have standing to pursue Notice-Based Allegations. Similarly, Plaintiffs make only global arguments, focusing on their standing to challenge the adequacy of notice.

The analysis above likewise focuses on notice-related concerns arising from Plaintiffs' exercise of porting rights under the INA Amendments. *Supra* Discussion § I.B.3. It is not immediately obvious that these concerns would support standing to challenge the revocations based on the merits of the determinations (*e.g.*, based on insufficiency of evidence or *ultra vires*

action). In sum, neither the parties' arguments nor discussion above address, much less resolve, whether Plaintiffs have standing to challenge the revocations for any reason other than lack of notice.

While the parties have not briefed the distinct standing issues raised by Plaintiffs' Merits-Based Allegations, the court finds such issues are not appropriate for resolution at this time. If Plaintiffs establish notice was improper (either because they or their then-current employers should have been provided notice), the revocation process would start over and there would be no reason for the court to review the prior revocations on the merits. Conversely, if Plaintiffs fail to establish they or their then-current employers were entitled to notice, they presumably would not have standing to challenge the merits of the revocations. Thus, while the court denies the Government's motion to dismiss for lack of standing as to these allegations, it also declines to allow Plaintiffs to advance them further in this action.[23]

II. FAILURE TO STATE A CLAIM

A. Arguments

Government's Argument. The Government argues Plaintiffs' first cause of action (APA violation) fails as a matter of law for two reasons. First, to the extent Plaintiffs rely on alleged procedural errors, the claim fails because USCIS followed its regulations. ECF No. 26 at 16 (noting 8 C.F.R. § 214.2(h)(11)(iii) requires NOIRs be sent "to the petitioner"). To the extent the regulations may be ambiguous, the Government argues USCIS's interpretation of them is entitled to deference. ECF No. 26 at 18, 19. Second, it argues multiple allegations should be dismissed

[23] This conclusion makes it unnecessary to address whether merits-based challenges would properly be raised in an action raising claims on behalf of multiple visa beneficiaries.

because they fail to meet pleading standards. ECF No. 26 at 16, 17 (noting certain allegations are "vague," "unadorned the-defendant-unlawfully-harmed-me accusation[s,]" or "formulaic recitation of a cause of action's elements").

As in its argument on standing, the Government asserts the court should disregard "case law from other circuits regarding immigrant visa petitions" because nonimmigrant visa petitions are distinguishable. ECF No. 26 at 18. It points to one specific distinction between porting beneficiaries of approved I-140 [immigrant] Petitions and H-1B Petitions: the person or entity that files the porting petition. While beneficiaries of approved I-140 Petitions file their own porting petition, it is the employer who files the petition for porting beneficiaries of H-1B Petitions. ECF No. 26 at 19. Based on this distinction, the Government argues "Plaintiffs' analogy to the immigrant visa petitioning process is inapposite . . . and USCIS's reasoned determination to maintain the existing regulatory notice regime for H-1B nonimmigrant visa petitions is worthy of deference." *Id.* ("USCIS [has] specifically clarified that nonimmigrant H-1B beneficiaries were excluded [from the expanded notice addressed in *Matter of V-S-G-Inc*.] due to statutory differences.") (quoting *Matter of V-S-G-Inc*. at 3 n.7).

The Government argues the second cause of action should be dismissed because Plaintiffs' status as beneficiaries of H-1B Visas does not give them a protectable liberty or property interest. ECF No. 26 at 21 (citing *Mandonado-Guzman v. Sessions*, 715 F. App'x 277 (4th Cir. 2017) (holding alien had no property or liberty interest in U visa because "[s]tatutes that only provide discretionary relief . . . do not create a property or liberty interest subject to the Due Process Clause and U visas "are a discretionary form of relief"); *Diomande v. Gonzales*, 247 F. App'x 450 (4th Cir. 2007) (holding alien who challenged immigration judge's refusal to review revocation of visa "cannot allege a colorable constitutional [due process] violation because he cannot establish that

he has a property or liberty interest at stake"). Even if Plaintiffs have a property or liberty interest in the revoked Initial H-1B Petitions, the Government argues their Due Process claim fails because USCIS followed proper procedures for reasons explained in its argument on the APA claim.

Plaintiffs' Response. Plaintiffs respond that their allegations are sufficient to state an APA claim because they allege the revocations were "*ultra vires*, arbitrary and capricious, and without observance by law[,]" and specify the harms each of them has suffered or will suffer as a result. ECF No. 27 at 13. Plaintiffs assert they cannot set forth more specific facts because they "do not have copies of the adverse decisions" they are challenging and cannot know the "relevant facts . . . until the Agency collects, certifies, and produces the certified administrative record[.]" *Id.* at 14; *see also id.* at 15, 16 (asserting "[e]ach individual record may reveal" additional grounds for reversal of revocation once the "Agency produces the administrative record and the Plaintiffs review it.").

Addressing their allegation USCIS failed to provide proper notice, Plaintiffs argue the term "petitioner" in USCIS regulations must be construed "to include a beneficiary or the beneficiary's current [H-1B] employer" because these are the only persons or entities that can "meaningfully respond." *Id.* Addressing their allegation revocation was *ultra vires*, Plaintiffs assert there is no authority for revocation of a visa that has expired. *Id.* at 15.

In support of their Due Process claim, Plaintiffs rely on (1) general propositions of law as to the breadth of what may constitute a property interest and (2) the "significant rights" granted to H-1B "workers with an approved Form I-140 immigrant visa petition." ECF No. 27 at 17, 18. Plaintiffs argue the acquisition of these rights upon approval of an I-140 Petition is sufficient to support their Due Process claim. *Id.* at 18. In addition, Plaintiffs argue approval of their H-1B Petitions gave rise to a "legitimate claim of entitlement . . . regardless of whether the Agency can

revoke those visas." *Id.* at 19 (noting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) rejected argument procedures set for deprivation define whether there is a property right); *see also* ECF No. 27 at 10 (explaining, under zone-of-interests analysis, that while both immigrant and nonimmigrant visas may be "revoked at any time[,] . . . [t]he grounds for revoking an immigrant petition are far wider than those for an approved [H-1B Visa]," which are limited to the five grounds listed in 8 C.F.R. § 214.2(h)(11)(iii)(A)).

Government's Reply. In reply, the Government argues USCIS may "revoke petitions like these at any time, even after the expiration of the petition." ECF No. 28 at 1 (citing 8 C.F.R. § 214.14(h)(11)(i)(B)).[24] It maintains Plaintiffs' arguments do not overcome the factual insufficiencies in their allegations as they cannot postpone their obligation to comply with pleading requirements based on hoped-for discovery. As to the Due Process claim, the Government notes Plaintiffs' failure to address the authority cited in its opening memorandum and "attempt to bootstrap the benefits of an approved immigrant visa petition to those of a nonimmigrant visa petition" should be rejected because persons "seeking admission to the United States do not do so under any claim of right." *Id.* at. 8 (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (holding foreign national who sought admission under the War Brides Act was not entitled to hearing prior to exclusion).

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[24] The regulation cited by the Government (8 C.F.R. 214.14) addresses U visas, a category of visa issued to alien victims of qualifying crimes, not H-1B Visas. However, similar language appears in 8 C.F.R. § 214.2(h)(11)(i)(B), which addresses revocation of H-1B Petitions. *Id.* ("The director may revoke a petition at any time, even after the expiration of the petition."). Subsequent subparagraphs list two grounds for automatic revocation and five grounds for revocation only after notice and an opportunity to respond. 8 C.F.R. §§ 214.2(h)(11)(ii), (iii). Revocation for statements that were "not true and correct" falls into the latter category (required notice). *See supra* n.11 (listing grounds for revocation of H-1B Visas with and without notice).

B. Standard

A motion under Federal Rule of Civil Procedure 12(b)(6) should be granted only if, after accepting all well-pleaded allegations in the complaint as true, it appears certain that the plaintiffs cannot prove any set of facts in support of their claims that entitles them to relief. *See Edwards v. City of Goldsboro,* 178 F.3d 231, 244 (4th Cir. 1999). Although the court must take the facts in the light most favorable to the plaintiff, it "need not accept the legal conclusions [the plaintiff would draw] from the facts." *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (quoting *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000)). The court may also disregard any "unwarranted inferences, unreasonable conclusions, or arguments." *Id.*

The Rule 12(b)(6) standard has often been expressed as precluding dismissal unless it is certain that the plaintiff is not entitled to relief under any legal theory that plausibly could be suggested by the facts alleged. *See Mylan Labs., Inc. v. Markari*, 7 F.3d 1130, 1134 (4th Cir. 1993). Nonetheless, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (quoted in *Giarratano*, 521 F.3d at 302). Thus, in applying Rule 12(b)(6), the court also applies the relevant pleading standard. Despite the liberal pleading standard of Rule 8, a plaintiff in any civil action must include more than mere conclusory statements in support of a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (court need only accept as true the complaint's factual allegations, not its legal conclusions); s*ee also McCleary-Evans v. Maryland Dept. of Trans.*, 780 F.3d 582, 587 (4th Cir. 2015) (noting "*Iqbal* and *Twombly* articulated a new requirement that a complaint must allege a plausible claim for relief, thus rejecting a standard that would allow a complaint to survive a motion to dismiss whenever the pleadings left open the *possibility* that a plaintiff might later

establish some set of [undisclosed] facts to support recovery." (emphasis and alteration in original, internal quotation marks omitted)); *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (citing *Robertson v. Sea Pines Real Estate Companies, Inc.*, 679 F.3d 278 (4th Cir. 2012) for proposition Plaintiff need not forecast evidence sufficient to prove the elements of a claim, but must allege sufficient facts to establish those elements).

C. Discussion

1. APA Claim

Non-Specific Allegations. As the Government argues, a number of Plaintiffs' allegations in support of their first cause of action include formulaic recitation of elements of or grounds for assertion of an APA claim. *See*, *e.g.*, ECF No. 22 ¶ 546 (alleging USCIS's actions were "arbitrary, capricious, an abuse of discretion, and not in accordance with law," "contrary to constitutional right," and "in excess of statutory authority"); *id.* ¶¶ 551-55 (defining arbitrary and capricious conduct followed by boilerplate allegations repeating subparts of definition); *id.* ¶¶ 553, 554 (alleging "USCIS's revocation is arbitrary and capricious because it entirely failed to consider an important aspect of the problem" and "because its rationale runs counter to the evidence in the record"); *id.* ¶ 556 (relying on unspecified violations "which Plaintiffs will only be able to articulate and identify after they receive copies of the revocations" and alleging "[e]ach revocation is substantially unjustified"). These allegations set forth "enough facts to state a claim to relief that is plausible on its face" *only* to the extent read within the confines of the more specific allegations included in the Second Amended Complaint. *See Twombly*, 550 U.S. at 570; *see also Iqbal*, 556 U.S. at 678 (holding "mere conclusory statements" do not satisfy pleading standards). Thus, these otherwise generic allegations do not expand the scope of the specific allegations

discussed below beyond listing the elements of an APA claim or generic grounds that may be satisfied by the specifically-alleged actions or inactions.

Notice-Based Allegations. Specific allegations include that the revocations were invalid because USCIS failed to provide notice to either Plaintiffs or their current employers, including the following allegations:

> 547. Each revocation violates at least one subpart of § 706(2)(a) because [USCIS] did not notify Plaintiffs or Plaintiffs' current employers and the [INA] reflects an intent that [USCIS] notify the beneficiary or the beneficiary's current employer before issuing a revocation.
> * * *
> 549. Each revocation also violates at least one subpart of § 706(2)(a) because the Agency gave no Plaintiff notice or opportunity to meaningfully respond to [USCIS's] allegations.

ECF No. 22.

While the Government presents arguments against finding any error in the notice provided, the court does not find the issue so clear as to warrant dismissal. Most critically, though *Mantena* is distinguishable in some respects (*see supra* Discussion § I.B.3 "Possible Distinction"), its rationale appears to support finding notice to the Initial Petitioner is not sufficient where that petitioner is no longer an "affected party" due to the beneficiary having exercised INA Amendment porting rights.[25] Further, while *Matter of V-S-G-Inc*. expressly disavowed any intent to extend the

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[25] In discussing the merits (whether notice was proper), *Mantena* relied on changes effected by AC21's portability provisions to conclude the former employer "no longer has any interest in the matter[,]" and either the employee-beneficiary, her new employer, or both were the "real parties in interest" entitled to notice. *Id.* at 736. Therefore, providing notice only to the former employer "runs directly against the aim of the statutory amendments" that allowed job portability. Ultimately, rather than deciding *which* of the real parties in interest should receive notice, the court remanded that decision to the district court, suggesting it might "consider remanding to the [USCIS Administrative Appeals Office ("AAO")] for it to address the question in light of its particular expertise in the matter." *Id.* at 736.

right to notice to H-1B Visa beneficiaries or any subsequent employers, whether H-1B Visa beneficiaries who have ported to new employers or the new employers themselves are entitled to notice was not at issue in the underlying administrative appeal and is, at most, given cursory treatment. *Matter of V-S-G-Inc*. is not, in any event, intended to apply in federal court nor could it bind this court. *See Matter of V-S-G-Inc.*, Cover Memorandum (explaining the adopted opinion in *Matter of V-S-G-Inc*. is "intended solely for the guidance of USCIS personnel" and "may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law . . . in litigation with the United States, or in any other form or manner."). Thus, while the limitation expressed in *Matter of V-S-G-Inc.* may be consistent with the Government's position in this action, it is neither controlling here nor sufficiently persuasive to warrant dismissal for failure to state a claim.[26]

Merits-Based Allegations. The first cause of action also includes the following specific allegations:

> 548. Each revocation also violates at least one subpart of § 706(2)(a) because [USCIS] lacks authority to revoke a Cap H1B Visa that has already expired on its own terms because [USCIS] cannot return that visa number to the cap pool for the appropriate fiscal year.
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> * * *

[26] Indeed, at least one factor *Matter of V-S-G-Inc.* found favored notice to I-140 beneficiaries who had ported but disfavored notice to their subsequent employers responsible for filing the transfer petition, arguably favors notice to subsequent employers in the case of H-1B Visa beneficiaries who have ported. *See Matter of V-S-G-Inc.* at 3 n.7 (explaining decision did not extend notice rights to "*nonimmigrant* H-1B beneficiaries" because "unlike portability for immigrant beneficiaries, which puts the decision to file a port request in the hands of the beneficiary when that person meets the requirements of the statute, nonimmigrant beneficiaries of H-1B petitions expressly require 'the filing by the prospective employer of a new [H-1B visa] petition . . . before changing employers is permitted." (emphasis in original)).

> 550. Each revocation also violates at least one subpart of § 706(2)(a) because [USCIS] cannot show that the original petitioner engaged in fraud in each specific Plaintiff's Cap H1B Visa petition.

ECF No. 22 ¶¶ 548, 550.

While these allegations may be sufficiently specific to satisfy *Iqbal-Twombly* pleading requirements, the court declines to make a determination on their viability for reasons addressed above in the discussion of standing. *See supra* Discussion § I.B.4.

Conclusion. In sum, Plaintiffs' specific allegations raise three potential grounds for relief: first, for failure to provide Plaintiffs or their then-current employers with notice and an opportunity to respond prior to revocation of the Initial H-1B Petitions (¶¶ 547, 549); second, for *ultra vires* action (specifically, revocation where the visa number cannot be returned "to the cap pool for the appropriate fiscal year") (¶ 548); and third, for insufficiency of evidence (because USCIS "cannot show the original petitioner engaged in fraud" with respect to the specific Plaintiffs' visa petitions) (¶550) . The first ground, if established, may support vacating the revocations unless and until proper notice and an opportunity to respond are provided. The other two grounds raise arguments that will become moot if the revocations are vacated for lack of notice or as to which Plaintiffs will be unable to establish standing if they fail to prevail on the notice issue. Given these considerations, Plaintiffs' APA claim shall proceed only as to the first ground listed above.

2. Due Process Claim

In their second cause of action, Plaintiffs allege their visas were revoked "without any meaningful process" and their Due Process rights were violated by USCIS "knowingly sending notices of intent to revoke and final revocations to companies it knew were defunct and using addresses it knew were invalid." *Id.* ¶¶ 561, 562. These allegations are sufficiently specific, when

combined with preceding factual allegations, to satisfy the *Iqbal-Twombly* specificity requirements.

This leaves two potential grounds for dismissal, that Plaintiffs: (1) have no constitutionally protected property or liberty interest in their approved Initial H-1B Petitions; or (2) were provided any process due. For reasons explained above as to the APA claim, the court finds the law is not so clear as to support dismissal on the second ground. The first ground presents a closer question**.**

As noted in *Mantena*, "many courts" have cast doubt on the premise a beneficiary's interests in his or her visa implicates constitutionally protected "liberty or property interests." *Mantena*, 809 F.3d at 736 (addressing immigrant petition); *see also Musunuru,* 831 F.3d at 891 ("Musunuru did not have a protected liberty or property interest in the continued validity of VSG's [I-140] petition because the decision to revoke the petition was left to the discretion of USCIS.").[27] *Mantena*, nonetheless, avoided the "potentially problematic constitutional question" in light of finding in plaintiff's favor on her statutory (APA) claim. This court, likewise, declines to decide the potentially problematic constitutional question of whether Plaintiffs have a property or liberty interest sufficient to support a Due Process claim given the likelihood the same relief that might be available under such a claim would be available (or not) under their APA claim.

CONCLUSION

For the reasons set forth above, the court denies the Government's motion to dismiss for lack of standing and failure to state a claim. Rejection of the Government's challenge to standing

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[27] The court held Musunuru had no constitutionally protected interest because the decision at issue was discretionary and this discretion was not modified by the beneficiary's exercise of portability rights. *Id.* at 892 ("Nor does the AC21 make a ported petition impervious to revocation. USCIS may still revoke an I-140 petition at its discretion, . . . *provided, of course, that it follows the required procedures*." (emphasis added)).

rests on a finding Plaintiffs have standing to challenge the adequacy of notice and denial of an opportunity to be heard under the APA. The court makes no definitive ruling whether Plaintiffs have standing to challenge the revocations on the merits because it finds such a determination unnecessary for the reasons explained above. Similarly, while the court denies the motion to dismiss for failure to state a claim, it does so without deciding whether Plaintiffs have a sufficient property or liberty interest to support a Due Process claim.

IT IS SO ORDERED.

s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
Senior United States District Judge

Columbia, South Carolina
July 30, 2019